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IN THE SUPREME COURT OF THE
UNITED STATES

1124

BETTY PITTMAN WARWICK,

Petitioner for Certiorari,

vs.

BARRY S. SEGAN,

Respondent in Certiorari,

PETITION FOR CERTIORARI

WYMAN C. LOWE
701 Carnegie Building
Atlanta, Georgia 30303

Attorney for Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

BETTY PITTMAN WARWICK,

Petitioner for Certiorari

VS.

BARRY S. SEGAN

Respondent in Certiorari

PETITION FOR WRIT OF CERTIORARI FOR REVIEW OF EACH OF TWO ORDERS, FINAL IN NATURE, OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

COMES NOW BETTY PITTMAN WARWICK, by and through her attorney, Wyman C. Lowe, who is a Member of the Bar of this Court and respectfully petitions the Court for writ of certiorari for review of each of two Orddrs, final in nature, rendered and entered in the appeal, "BETTY PITTMAN WARWICK, Appellant--Plaintiff vs. BARRY S. SEGAN, Appellee--Defendant" in the United States Court of Appeals for the Fifth Circuit. The main Order, entered on October 1, 1969, denied the motion of the Appellant for a 4-day extension of time from September 8, 1969, for filing her Brief, as it were a motion for extension for said purpose "to and including September 15, 1969," which was a Monday, and granted a motion of the Appellee to dismiss the appeal for failure of the Appellant to file her Brief timely on September 8, 1969. The other Order, entered on November 11, 1969,

denied a motion of the Appellant for reconsideration as to the Order that had been entered on October 1, 1969, and for reinstatement of the appeal.

Petitioner respectfully shows as follows in her petition, which is prepared in compliance with applicable requirements in Rule 23 of this Court as to the contents and the order of contents, the applicable and required parts hereinafter being numbered or lettered in a manner corresponding to the numbering or lettering of the parts in Rule 23, and no reference being made hereinafter to inapplicable requirements of Rule 23:

1.

(a) There were no opinions delivered in the case in the courts below. A copy of the said Order that was entered on October 1, 1969, and copy of the said other Order that was entered on November 11, 1969, appear on pages xviii and the last page, respectively, of the "Supplement to the Statement of the Case," which follows next after the "Statement of the Case."

(b) STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

(i) The main and first Order sought to be reviewed was entered on October 1, 1969, date of its rendition not being shown thereon. The other Order sought to be reviewed was entered on November 11, 1969, date of its rendition not being shown thereon.

(ii) No motion or petition for

a rehearing was filed. However, a motion for reconsideration as to the Order filed October 1, 1969, and reinstatement of the dismissed appeal was filed. The Order denying Motion was entered on November 11, 1969.

(iii) The statutory provision believed to confer on this Court jurisdiction to review the said two Orders, each of which being of a final nature is embodied in Sec. 1254, 28 U. S. C. A., the applicable provisions in that Code section being:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

(c) QUESTIONS PRESENTED FOR REVIEW

1. Was the Appellant, Betty Pittman Warwick, entitled under Rule 25 (a), F. R. A. P., to have her brief deemed filed on September 12, 1969, considering the contents of the documents in the certified Transcript of the Record and the circumstances shown in her "Statement of the Case" hereinafter?

2 (a). Was there justification for the three-Judge panel to state in one-paragraph of the Order filed on October 1, 1969 that appellant's motion for a further extension of time "to and including September 15, 1969" for filing her Brief was denied when the only motion before the Court was one by the appellant for a 4-day extension from September 8, 1969, "to and including September 12, 1969" for filing her Brief?

(b). Did the Court give due weight to its misunderstanding as to length of time extension requested in Appellant's motion for time extension in considering the motion for reconsideration and reinstatement?

3. Where the grounds set forth in Appellant's motion, as amended by an Amendment, for 4-day time extension from September 8, 1969, for filing her Brief sufficient to warrant the granting of such extension?

4. Was what was the equivalent of a 4-day late filing of only Appellant's Brief sufficient to warrant dismissal

of the appeal, considering that the United States Court of Appeals for the Fifth Circuit ruled in Phillips vs. Employers Mut. Liability Ins. Co., 239 F 2d 79 that late filing of record and brief on appeal was at most a non-jurisdictional defect in the prosecution of the appeal and was not sufficient to warrant dismissal?

5.(a) Considering particularly paragraphs 8, 9, 10, of Appellant's motion for reconsideration as to the two-paragraph Order filed October 1, 1969, and for reinstatement of the appeal, the two exhibits attached to that motion and made parts thereof, the entry in the :Filings-Proceedings" in the Record as to the filing of the Brief, and the letter, dated January 23, 1970, of the Chief Deputy Clerk to the undersigned attorney, original of which is third page in the Transcript of the Record, does it appear there was non-compliance in the Clerk's Office with Rule 25 (a), F. R. A. P. through failure to keep some record or make some entry in the "Filings-Proceedings" that the Brief had been mailed, Air Mail, on September 12, 1969, since the Atlanta postmarks and the stampings of "AIR MAIL" on the two boxes containing the 25 copies of the Brief clearly showed that?

(b) Does it appear that such non-observance of Rule 25 (a), F. R. A. P. in the Clerk's Office probably resulted in the said three-Judge panel not being aware Appellant was entitled to have her brief filed on September 12, 1969?

6. Did the service on October 15,1969

of copy of the motion for reconsideration and reinstatement, filing of the motion on October 16, 1969, and entertainment of that motion by the Court operate to toll the running of statutory time for Appellant's filing of this petition for certiorari either from October 16, 1969, to and including November 11, 1969, date the Order denying the motion was filed, or toll the running from October 1, 1969, to and including November 11, 1969?

7. Did said three-judge panel of the Court of Appeals err in denying the Appellant's motion, as amended, for reconsideration and reinstatement, considering together the contents of that motion and amendment thereto, including exhibits attached as part of the motion and amendment, and the statements in letter of the Chief Deputy Clerk, dated January 23, 1969, that is on the third page in the Transcript of the Record?

8. Were the circumstances on which the dismissal of the appeal was predicated such as to justify avoidance of consideration of the appeal on its merits?

9. Considering that motion to dismiss the appeal for failure of Appellant to file her Brief timely on September 8, 1969, was not filed before September 12, 1969, date Appellant's Brief deemed filed under Rule 25 (a), F. R. A. P., and that Appellee filed his reply in opposition to Appellant's motion for reconsideration and reinstatement five days later than allowed by Rule 27 (a), F. R. A. P., for filing a response in

opposition to a motion, did the Court err in dismissing the appeal and denying the motion for reconsideration and reinstatement?

9. Did the said three-Judge panel, in denying Appellant's Brief for an extension of time de minimis for filing her Brief, is dismissing the appeal under the circumstances, in denying the motion for reconsideration and reinstatement, and thereby avoiding consideration of the appeal on its merits, so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

(c) STATEMENT OF THE CASE

In this petition for certiorari, Betty Pittman Warwick, who was the Plaintiff in the case in the United States District Court, Middle District of Florida, Tampa Division, and was the appellant in an appeal to the United States Court of Appeals for the Fifth Circuit from judgment of that District Court for the Defendant, Barry S. Segan, and against the Plaintiff, seeks review of a two-paragraph Order of that Court of Appeals, filed October 1, 1969, and also another two-paragraph Order of that Court of Appeals, filed November 11, 1969, which are Document Number 13 and 18 in the Certified Transcript of the Record.

In the first paragraph of the first said Order, filed October 1, 1969, that Court of Appeals denied a motion of the appellant, Mrs. Warwick, as if it were a motion for an extension "for filing of his brief, in the above cause, to and including September 15, 1969", but the only motion appellant ever filed for time extension for filing her Brief was one for a 4-day extension from September 8, 1969, a Monday, "to and including September 12, 1969". The second paragraph of that Order, filed October 1, 1969, granted the motion of the appellee, in effect, to dismiss the appeal for failure of the appellant for file her brief by September 8, 1969. Motion of the appellant, filed October 16, 1969, copy of which having been served on Defendant's counsel on October 15, 1969, for reconsideration as to the two-para-

graph Order, filed October 1, 1969, and for reinstatement of the appeal was denied in the last said Order, filed November 11, 1969.

The last said Order, in effect, affirmed the first Order, thereby caused the first Order to become a final determination of the appeal; and the last said Order itself was, in effect, a final determination as to the appeal; but each of said two Orders was rendered before there had been consideration of the appeal on its merits.

For purpose of ease and convenience of reference by the Justices of the Court, there is included hereinafter, next following the last page of this "Statement of the Case", as "Supplement to the Statement of the Case", a copy of the "Filings-Proceedings" of the Court of Appeals in this appeal and most of the other documents or papers to which reference is made in this petition for certiorari, including the Order filed October 1, 1969, and the Order filed November 11, 1969, as to which review is sought. The pages within each document in the Transcript of the Record, certified by the Clerk of the Court of Appeals, and filed with this petition with the Clerk of the Supreme Court, are numbered consecutively, but there is not consecutive numbering of pages of the entire Transcript of the Record. The pages within each document included in "The Supplement to the Statement of the Case" are numbered consecutively, and the pages of the entire "Supplement to the Statement of the Case" are also numbered con-

secutively with small Roman numerals. The document number that is at bottom of first page of each document in the Transcript of the Record is also at bottom of first page of the document in the "Supplement to the Statement of the Case", which "Supplement" being included in this petition next after the last page of the "Statement of the Case".

References hereinafter to any numbered document of which a copy is in the Transcript of the Record will usually be to the document number and the small Roman number of the first page of the copy of the document as it appears in "Supplement to the Statement of the Case", which will be referred to only as "Supplement"or"Supp."

It is respectfully requested that the Court particularly note and consider the following relevant facts:

That a three-Judge panel, in the first paragraph of its Order that was filed October 1, 1969, copy of that Order being Document 13 in the Certified Transcript of Record and page xviii of the Supplement, denied a motion of the Appellant for a 4-day extension of time from September 8, 1969, a Monday, "to and including September 12, 1969" for filing Appellant's Brief as it were, in the phrasing of the Order, a motion of the Appellant, Mrs. Warwick, for an extension of time "for filing his brief, in the above cause, to and including September 15, 1969, and in the second paragraph of that Order granted a motion of the Appellee, in effect, to dismiss the appeal for failure of the appellant to file her Brief by

September 8, 1969 (Supplement p. xi); but that said motion of the Appellee to dismiss the appeal was not filed (as shown on its face (Supp. p. 81), until September 12, 1969, the date Appellant's Brief was, in effect, filed; that the 4-volume very lengthy Appendix, offset printed, had been timely filed on September 2, 1969, as shown in Docket Entries (Supp. p. i), even though an uncontested Order of the Clerk had granted a 6-day extension, the first extension, for filing both the Appendix for the Briefs and Appellant's Brief to and including September 8, 1969; that the undersigned attorney for the Appellant by letter dated September 6, 1969, to the Chief Deputy Clerk and the Senior Clerk, confirming his long distance telephone request made the day before to the Senior Clerk, in absence of Chief Deputy Clerk, requested 4-day extension from September 8, 1969 for filing Appellant's Brief, and that said letter, stamped as received in Clerk's Office on September 8, 1969, and indicating the Senior Clerk had said in telephone conversation on September 5, 1969, such requested extension would be granted, is attached beneath the motion of the Appellant for 4-day time extension, the motion and letter together being Document 9 in the certified Transcript of the Record (Supp. pp. 4, 5, 6, 7, 8, 8a, 8b); that Appellant, in said motion, a part of Document 9 (Supp., pp. 4-8), moved only "that an extension to and including September 12, 1969", from September 8, 1969, be granted for filing her Brief, but that the first paragraph of the Order, filed October 1, 1969, denying the motion for

time extension, and the second paragraph of that Order (Document 13, Supp., p. xviii), granting the motion of the Appellee to dismiss the appeal, were obviously predicated on the erroneous assumption that Appellant had moved for an extension "to and including September 15, 1969" for filing the Brief.

The copy of the entries of "Filing-Proceedings" in the United States Court of Appeals (Supplement, p. i) contains an entry showing the filing of the Appendix, consisting of Volumes I through IV, on "9/2/69". The Index of the Certified Transcript of Record attached beneath the certificate of the Clerk of the Court of Appeals at bottom of that Transcript shows Volumes I, II, and III of the Appendix and a Volume IV, Exhibits, are in the certified record. Volume 1 of that Appendix contains offset printed copies of papers filed for the parties and Orders of the Court filed in the case in the United States District Court; Volumes II and III of the Appendix contain the Official Reporter's transcript of the portions of the proceedings in the United States District Court designated by the Plaintiff-Appellant, Betty Pittman Warwick, for inclusion in the transcript. Volume IV of the Appendix contains reproductions of the Exhibits proffered by the by the parties.

The Appendix shows that Betty Pittman Warwick, a resident of Atlanta, Georgia, brought the suit against Barry S. Segan, for damages for physical injuries sustained

by her when she was struck on Piedmont Avenue in Atlanta, Georgia while she was walking from one side of Piedmont Avenue towards the opposite side, by an automobile then owned and operated by Barry S. Segan; that at the time she was so injured Barry S. Segan was a resident of Atlanta, Georgia, but within about two weeks moved from Atlanta and became a resident of Tampa, Florida; that jury trial of the case for more than three days was held in Tampa, Florida; that judgment entered following the trial was for the Defendant and against the Plaintiff; that, after filing of timely motion by the Plaintiff for new trial and denial of the motion, without a hearing, timely notice of appeal by the Plaintiff from the judgment to said Court of Appeals and bond for appeal costs were filed.

The Appellee, in his motion, moved the Court of Appeals for an Order for alleged failure of the Appellant to timely prosecute the appeal. The grounds set forth in the motion show, in effect, it is based on the fact Appellant had not filed her Brief on or before September 8, 1969, the time to which a six-day extension from September 2, 1969, had been granted(Supp.,p.xi).

In his said motion, the Appellee refers to an "Order of the Court dated September 2, 1969", granting the Plaintiff additional time to file her Brief. An entry on the "Filings-Proceedings", copy of which in the certified record, reads "9/2/69 Flg. Ext. 9/8/69-Appellant's Pr. & Reproduced Appendix-(GG) NFE"(Supp,p.i). Initials "(GG)" are those of Mr. Gilbert Panucheau, the Chief Deputy Clerk, who

himself granted and signed the Order allowing the extension from September 2, 1969, to and including September 8, 1969, for filing both the Brief and Appendix. However, Appellant did not use any of the time in the six-day extension granted for filing the Appendix, and timely filed the lengthy offset printed 4-volume Appendix on September 2, 1969, as shown in certified copy of the "Filings-Proceedings", which will hereinafter be referred to as "Docket Entries"(Supp.,p.i).

The Appellant states in paragraph 5 of her motion for 4-day extension to and including September 12, 1969 for filing her Brief, copy of which motion and Amendment thereto being on pages iv-x of Suppl., that the Order of the Chief Deputy Clerk granting the extension to and including September 8, 1969, had a stamped notice thereon that no further extension should be requested However, the notice did not indicate that, in event of emergent need, arising from necessitous circumstances, no further extension would be granted.

Appellant stated in paragraph 5 of her motion for the 4-day extension for filing her Brief that the undersigned attorney for the Appellant telephoned the Clerk's Office on September 5, 1969, which was three days before expiration of the extended time, talked with Mr. Richard Windhorst, Senior Clerk, after requesting to talk with the Chief Deputy Clerk and being informed he was not available; that the undersigned attorney then made request over the telephone to the Senior Clerk for a 3-day extension for

filing the Brief; that the Senior Clerk then said the extension would be granted if the undersigned would mail letter request for it and send copy of the letter to opposing counsel, which the undersigned did. The motion of the Appellee to dismiss the appeal contains statements also that counsel for the Plaintiff made oral request on September 5, 1969, for an additional extension and followed that with a letter of September 6, 1969, showing grounds for seeking the extension, but contends that the grounds set forth in the undersigned's letter of September 6th were insufficient.

Paragraph 6 of the motion of the Appellant for 4-day extension to and including September 12, 1969, reads:

> "6. In that letter, addressed to the Chief Deputy Clerk and Chief Clerk, which was received in the Clerk's Office on September 8, 1969, the undersigned requested 3 or 4 day extension from September 8, 1969, and stated the 4 day extension was urgently needed. On this morning, September 9, 1969, the undersigned received telephone call from Mr. Windhorst, in which he stated a telegram and telephone call had been received from opposing counsel in opposition to further extension for filing Appellant's Brief. Mr. Windhorst requested that motion be sent for the extension of 4 days requested and indicated, insofar, as the Clerk's

Office was concerned, it would be favored."(Supp.,p.vii)

The copy of the Docket Entries in the certified record contains the following entries:

"1/10/69 Flg. Motion of Appellant for Ext. of time for Filing brief".
"9/15/69 Appellant's Amendment of Her Motion for a 4-day extension".(Supp,p.i

The number of the month shown in said entry "1/10/69" obviously is a typographical error and was intended to be "9/10/69", the last date entry above it being "9/2/69.

In "Appellant's Amendment of Her Motion for a 4-day Time Extension" for filing her brief, copy of which in the certified record, she struck paragraph 7 of her said motion, substituted therefor and in lieu thereof the following:

"7. The undersigned is mainly responsible for arranging the continued urgently needed stay of his 86-year old father, a widower, as a patient in a medical-care nursing home, located about 125 miles from Atlanta, Ga., where the undersigned has his office and about 15 miles from where his father had been living, and for insuring that his father has special medical care when needed over and above that provided by said home. It was necessary for the undersigned to assume financial responsibility for keeping

"his father in that nursing home for most of the time he has been a patient there. In order to carry out his responsibility for insuring needed medical care and causing his father's bills at that home to be paid, part of which paid by the undersigned, it has been necessary for the undersigned to make very frequent trips to the nursing home and to spend considerable time on the trips on matter nearby in which his father has a financial interest.

During part of last year, the undersigned was a Congressional candidate and for several months thereafter was a contestant in election contests as to the outcome of that race. One of those contests is not yet determined. During that period of time, in which he lost much time from his law practice, there became an accumulation of matters of an emergent nature in his practice. It became necessary for him to obtain leave of absence from a Court in Atlanta part of this year because of said situation. In recent weeks, he has been under a heavy load of work in his practice, barely having time to get enough rest, such that he has not been able to take time to get very urgently needed dental care and work, the lack of which is adversely affecting his general health."

"In order to get completed Appellant's Brief in this appeal in time to have it mailed, Air Mail, on September 12, 1969, last day of the time extension he had requested by motion, necessary for him to work on the Brief in his office all night on night of September 11, 1969, "(Supp, pp. ix-x).

The father of the undersigned attorney died on November 5, 1969, at the Nursing Home to which reference is made in the said Amendment to the motion.

It is requested that reference be made to an entry in the Docket Sheet, entitled "Filings-Proceedings", which is page i in the "Supplement to the Statements of the Case" hereinafter and is page 2 of the certified Transcript of the record, the entry being "9/12/69 Flg. Motion of Appellee to Dismiss".

It is requested that reference be made also to the two Exhibits that are attached in the certified record and in the "Supplement to the Statement of the Case" hereinafter beneath and to the motion of appellant for reconsideration as to the Order filed October 1, 1969 and for reinstatement of the appeal, said Exhibits being pages xxxi and xxxii of said "Supplement", which follows next herein the last page of this "Statement of the Case".

With respect to said two Exhibits, paragraph 10 of the motion for reconsideration as to the Order filed October

1, 1969, and for reinstatement of the appeal reads as follows, that motion being Document 14 in the certified record and beginning on pagg xx of the "Supplement to the Statement of the Case":

> "The original of notations and Post Mark made and initialed by Mr. James F. Wright, Post Office Clerk, who received the two boxes (one containing 12 copies of Appellant's Brief and the other containing 13 copies of it) at a window of the Federal Annex, the main Post Office in Atlanta, Georgia, between 11:30 and 12:00 P.M. on September 12, 1969, and a signed statement by Mr. Wright obtained from him, the original thereof, as to that mailing are attached to the original of this motion, and photocopies of the said initialed notations and signed statement of Mr. Wright are attached to each copy of the motion, and made parts hereof."

In the statement obtained from said Mr. Wright three days after said mailing that is one of said two Exhibits, the Post Office Window Clerk, Mr. James F. Wright, says:

> "On the 9/12/69, Mr. Lowe mailed two packages Air Mail to New Orleans, La.
>
> "They were mailed between 11:30 P.M. & 12:00 P.M. of that date and addressed to:

Chief Deputy Clerk
U. S. Court of Appeals
5 Circuit
400 Royal Street
New Orleans, La."

The notations on the said Exhibit bearing the initials "J. F. W. Clk.", which are the initials he signed, and bearing the Post Mark "Sep 12, 1969", with his signed initials in the Post Mark also, together show that $5.73 was paid for postage for one of the packages and $6.23 was paid for postage for the other package on September 12, 1969.

In this connection, an applicable part of Rule 25 (a) of the Federal Rules of Appellate Procedure is quoted next:

> "***Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs and appendices shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail, excepting special delivery, is utilized." (Emphasis added)

It is thus clear that it was necessary for the 25 offset printed copies of Appellant's Brief to be deemed filed on September 12, 1969, such mailing Air Mail of them being "the most expeditious form of delivery by mail, excepting special delivery".

Furthermore, it is also clear that the 25 offset printed copies of Appellant's Brief were not deemed either by the Clerk or by the three-judge panel as filed on September 12, 1969, although the post marks on the packages and the "Air Mail" stampings on them showed they had been mailed Air Mail on September 12, 1969. An entry in the "Filings-Proceedings", which is page 1 in the said "Supplement to the Statement of the Case" hereinafter and page 2 of the certified Transcript of the Record, reads: "~~9/15/69. Fls.-Appellant's Brief~~ (M)."

It is evident that the filing was originally indicated on the Docket Sheet by some Deputy Clerk, other than Mr. Ganucheau, the Chief Deputy Clerk, or Mr. Windhorst, the Senior Clerk, since the initial "(M)" was not the initial for the last name of either. It is shown in the motion of the Appellant for the 4-day time extension, her motion for reconsideration and reinstatement, and her reply to the motion to dismiss, all being in the certified Record and in the "Supplement to the Statement of the Case" hereinafter that the only Deputy Clerk with whom the undersigned talked in his telephone calls made to the Clerk's Office were Mr. Ganucheau or Mr. Windhorst.

It is obvious that the Deputy Clerk who made the original entry as to the time of filing of Appellant's Brief as "9/15/69", which entry being later marked over and no entry being shown on the Docket Sheet as to such filing being on September 12, 1969, disregarded the

post marks of "Sep 12 69", the stampings of "Air Mail" on the two packages of the briefs before the wrappings were removed, and the herein before quoted applicable part of Rule 25 (a), A. R. A. P.

In conjunction with the foregoing statements, there is quoted next paragraph 8 of Appellant's motion for reconsideration as to the two-paragraph Order filed October 1, 1969 and for reinstatement of the appeal, which motion and amendment thereto being on pages xx through xxxv of the said Supplement hereinafter:

> "8. A Deputy Clerk of this Court informed appellant's attorney in a telephone conversation in afternoon of October 10, 1969 that boxes in which briefs are sent and wrappings around briefs received in the Clerk's Offices are usually discarded and caused to be destroyed at about the time briefs received in the Clerk's Offices. The two cardboard boxes, one containing 12 copies of Appellant's Brief, and the other containing 13 copies of that Brief, were mailed, Air Mail, by the undersigned at a window of the main Atlanta Post Office a few minutes before midnight of September 12, 1969, and each postmarked "SEP 12 1969". A letter of transmittal was enclosed in the cardboard box containing the copies of the appendix, that was

> received in the Clerk's office on September 2, 1969 timely, the box having been sent by Air Express. However, no letter of transmittal was enclosed in either of the two cardboard boxes, one containing 12 copies of Appellant's Brief, and the other containing 13 copies of that Brief, in this appeal, both mailed at same time, Air Mail, postage prepaid, in the Atlanta Post Office by the undersigned before midnight of September 12, 1969, and received in the Clerk's Office on September 15, 1969, a Monday; and not any letter as to transmittal of the copies of that Brief was ever sent, separately, to the Clerk's Office. The undersigned had stated over telephone on September 11, 1969 to the Chief Deputy Clerk that he would mail, Air Mail, on September 12, 1969 the copies of Appellant's Brief for filing.

In said quoted paragraph 8, the undersigned attorney for the Appellant states no letter of transmittal was enclosed in either of the two cardboard boxes containing a total of 25 copies of Appellant's Brief mailed, Air Mail, by him at a window of the main Atlanta Post Office a few minutes before midnight of September 12, 1969. However, it is stated in the last sentence is said quoted paragraph 8 that:

> "The undersigned had stated over telephone on September 11, 1969 to the Chief Deputy Clerk that

he would mail, Air Mail, on September 12, 1969 the copies of Appellant's Brief for filing."

Since September 12 was a Friday and the Office of the Clerk of that Court of Appeals is closed on Saturdays, it is evident that the two said boxes could not be received in that Clerk's office until the following Monday, September 15. In this connection, reference is made to page ii-a of the Supplement hereto whereon appears a photographic copy of a letter of the Chief Deputy Clerk, dated January 23, 1970, to the undersigned attorney with respect to Appellant's Brief in the case. The original of that letter is attached on top of the first page of the certified Transcript of the Record, but it is not one of the documents in that Transcript to which the certificate of the Clerk relates.

It definitely appears, therefore, that the three-Judge panel, which in their Order filed October 1, 1969, denied Appellant's motion for 4-day extension "to and including September 12, 1969" for filing the Brief, as stated in the Order as if it were a motion for extension "to and including September 15, 1969" and granted Appellee's motion to dismiss the appeal on grounds the Brief had not been filed by September 8, 1969, were unaware that the date of filing of the Brief, under Rule 25 (a), F. R. A. P., would have been September 12, instead of September 15, 1969. The only entry in the "Filings-Proceedings" (Supp., p.i), which are in Document 5 at front of the

Transcript of the Record, with respect to the Brief is "~~9/15/69-Flg.-Appellant's Brief-(M)~~". This shows that some Deputy Clerk, having initial "M", upon receipt of the two boxes of the Briefs in Clerk's Office on Monday, September 15, made said docket entry and probably, after becoming aware of the filing of Appellee's motion to dismiss the appeal, marked over said docket entry. As stated in the hereinbefore quoted paragraph 8 of the motion for reconsideration, the undersigned attorney had notified Mr. Ganucheau, Chief Deputy Clerk, in a telephone conversation on September 11, 1969, that he would mail the copies of the Brief, Air Mail, on September 12, 1969. The said initial "M" is not an initial on any name of Mr. Ganucheau.

No reply of the Appellee to the motion of the Appellant for said 4-day time extension was ever made, although the motion to dismiss the appeal was filed on same date, September 12, 1969, as the date Appellant's Brief was lawfully due to be deemed filed. Citations of decisions will be given in the "Argument" hereinafter that show, in effect, a motion to dismiss an appeal for failure of an appellant to file timely a brief should not be granted if the motion is not filed before the Brief is filed.

Moreover, the Appellee did not file a reply to Appellant's motion for reconsideration as to the Order of October 1, 1969 and reinstatement of the appeal, which motion was entertained by the said three-Judge panel and denied by

Order filed November 11, 1969, until 12 days after the motion had been served or 11 days after it had been filed. He was later in filing his said reply to the motion, under applicable 27 (a) and (b), F. R. A. P., than Appellant was as to the time her Brief was due to be deemed filed, under applicable Rule 25 (a), Federal Rules of Appellate Procedure. Part of said Rule 27 (a), and all of (b) F. R. A. P., are quoted next:

> "(a)****Any party may file a response in opposition to a motion other than one for a procedural order (for which see subdivision (b)) within 7 days after service of the motion, but motions authorized by Rules 8, 9, 18 and 41 may be acted upon after reasonable notice, and the court may shorten or extend the time for responding to any motion."
>
> "(b) Determination of Motions for Procedural Orders. Notwithstanding the provisions of the preceding paragraph as to motions generally, motions for procedural orders, including any motion under Rule 26 (b) may be acted upon at any time, without awaiting a response thereto. Any party adversely affected by such action may request reconsideration, vacation or modification of such

action."

The second page of the "Filings-Proceedings" (Supp.,p.ii) shows motion of Appellant for reconsideration was filed "10/16/69" and Appellee's reply thereto was not filed until "10/27/69". The Certificate of Service at end of Appellant's motion for reconsideration shows service of a copy by mailing on October 15, 1969 (Supp., p. xxx). Appellee was, therefore, five days late, under Rule 27 (a) and (b), F. R. A. P., in filing his reply to said motion.

SUPPLEMENT TO THE "STATEMENT OF THE CASE-
COPIES OF DOCUMENTS IN THE CERTIFIED TRAN-
SCRIPT OF THE RECORD

27903

Date	Filings-Proceedings
7/22/69	Flg. Appellant's Motion for Extension of Time to File Appendix and Brief. GRANTED-30 days from court ruling on motion to strike & dismiss.
8/1/69	Flg. Order DENYING motions of appellee to strike; further DENYING appellee motion to dismiss appeal (WPG ILG DWD).
8/5/69	Flg. Supp. Record.
8/25/69	Flg. Second Supplemental Record on Appeal.
9/2/69	Flg. Ext. to 9/8/69 - Appellant's Br. & Reproduced Appendix - (GG) NFE
9/2/69	Flg. Appendix (m) (Vols. I thru IV), (only 4 copies of Vol. IV).
1/10/69 9/10/69	Flg. Motion of Appellant for Ext. of Time for filing brief. Flg. Ext. to 9/12/69 - Appellant's Br. - (REW)
9/12/69	Flg. Motion of appellee to dismiss.
9/15/69	Flg. Appellant's Reply to Motion of the Appellee to Dismiss Appeal (4 copies).
9/15/69	Flg. Appellant's Amendment of Her Motion for a 4-day extension.
~~9/15/69~~	~~Flg. Appellant's Brief (M).~~
10/1/69	Flg. Order DENYING appellant's motion for further extension of time to file brief to 9/15/69; further GRANTING appellee's motion to dismiss appeal (HT LRM GHC).

Date	Filing-Proceedings
10/1/69	Issg. Certified Copy of Dismissal Order to Clerk, Tampa, Fla.
10/1/69	Supplemental & Second Supplemental Record returned to Clerk, Tampa.
10/16/69	Flg. Motion of appellant for reconsideration as to the order of the Court denying her motion for a 4-day ext. for flg. appellant's Br. & granting appellee's motion to dismiss the appeal & for reinstatement of the appeal (4 t. copies).
10/23/69	Flg. Appellant's Reply to the Reply of Appellee to Motion of Appellant reconsideration as to the order filed on Oct. 1, 1969, denying appellee motion for 4-day extension of time for filing appellant's brief.
10/27/69	Flg. Appellee's Reply to Appellant's Request for Reconsideration of Order Denying Extension of Time and Dismissing Appeal.
11/3/69	Flg. Appellant's Amendment of her motion for Reconsideration as to the Order filed on October 1, 1969, and for Reinstatement of the Appeal.
11/11/69	Flg. Order Denying appellant's motion for reconsideration of Court's order denying appellant's motion for 4-day extension of time for filing br. & granting appellee's motion to dismiss appeal; further DENYING appellant's motion for reinstatement of appeal(HT LRM GHC).

ii-a

United States Court of Appeals

FIFTH CIRCUIT

WADSWORTH
CLERK

OFFICE OF THE CLERK

ROOM 408-400 ROYAL ST.
NEW ORLEANS, LA. 70130

January 23, 1970

Mr. Wyman C. Lowe
Attorney at Law
701 Carnegie Bldg.
Atlanta, Ga. 30303

Dear Mr. Lowe:

No. 27903 - Warwick v. Segan

Complying with your request by letter dated January 15, this letter will certify that your brief in the above case was received and filed in this office on Monday, September 15, 1969; that under our practice all wrappings, envelopes, cases, packages, etc. are destroyed immediately when received and there is no record of the postmark date of transmittal of the brief available in our file, nor does our file contain a covering letter of transmission of the brief.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By _____
G. F. Ganucheau
Chief Deputy Clerk

GFG:adg

cc-Mr. H. Shelton Philips

U.S. Court of Appeals

F I L E D

Aug 1 1969

EDWARD W. WADSWORTH
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27903

BETTY PITTMAN WARWICK,
Plaintiff-Appellant,

versus

BARRY S. SEGAN,
Defendant-Appellee.

- - - - -

Appeal from the United States District Court for the Middle District of Florida

- - - - -

Before GEWIN, GOLDBERG AND DYER, Circuit Judges.

BY THE COURT:

IT IS ORDERED THAT the motions of appellee to strike filed in the above entitled and numbered cause be and the same are hereby denied.

IT IS FURTHER ORDERED THAT appellee's motion to dismiss the appeal be and the same is hereby denied.

Document No. 7

Filed
Sept. 10, 1969

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

BETTY PITTMAN WARWICK, :

Appellant, :

vs. : APPEAL NO. 27903

BARRY S. SEGAN, :

Appellee. :

MOTION OF APPELLANT FOR TIME EXTENSION

Now comes BETTY PITTMAN WARWICK, Appellant in the above styled appeal, and moves the Court, pursuant to Rules (26) b and 27, F. R. A. P., for an extension of time to andincluding September 12, 1969, for filing in accordance with Rule 25 (a) Appellant's Brief, respectfully showing as follows:

1. On June 17, 1969, the record on appeal in said appeal was filed in the Office of the Clerk of this Court, the required docketing fee of $25.00 having previously been received from the undersigned attorney for the Appellant.

2. On July 2, 1969, Appellee's counsel served by mailing copy of a motion to dismiss the appeal, copy of motion to dismiss "Appellant;s Designation of the Parts of the Record Which She Intends to Include in the Appendix", of which copy had been prematurely served by

2.

Appellant's counsel on June 13, 1969, before the record was filed, and copy of motion to dismiss "Appellant's Amended Designation of the Parts of the Record Which She Intends to Include in the Appendix, striking said former Designation and substituting therefor and in lieu thereof a new Designation, copy of said Amended Designation having been served by mailing to Appellee's counsel on June 27, 1969. Within the next few days, Appellee's counsel served by mailing a copy of a motion to strike "Appellant's Amended Statement of the Issues Which She Intends to Present for Review", of which copy had been served by mailing on June 27, 1969 to Appellee's counsel; and also served by mailing on July 5, 1969 copy of a motion to strike some of the said pleadings of the Appellant or dismiss the appeal.

3. Appellant's undersigned attorney was left in a state of uncertainty from the date of receiving copies of said first motions, served on July 2, 1969, whetherto proceed with preparation and printing of the Appendix and Appellant's Brief or not until he received on August 2, 1969 a Memo from the Clerk, dated August 1, 1969, with accompanying copy of Order of a three Judge panel showing that the motions to strike and the motion to dismiss the appeal were denied. He had previously received a Memo, dated July 24, 1969, from the Clerk's Office showing that on that date "An extension of time to and including 30 days from Court ruling on motion to strike and dismiss" has been granted "for filing reproduced copies of the record---for filing appellant's brief." Subsequently, the undersigned wrote inquiry to the Chief Deputy Clerk whether "filing reproduced copies of the

record" meant, in effect, filing 10 copies of the Appendix, as designated by the Appellant, and received reply that it did. Thus, the time for filing the Appendix and Appellant's Brief was extended to and including August 31, 1969, as August 31 was a Sunday and September 1, was Labor Day, the time was, in effect, extended to and including September 2, 1969.

4. On that date, September 2, 1969, 10 reproduced copies of the Appendix for the Briefs and four reproductions of all the Exhibits, as part of the Appendix, were received in the Clerk's Office. On August 29, 1969, the undersigned telephoned the Chief Deputy Clerk and requested extension to and including September 8, 1969, for both filing the Appendix and Appellant's Brief, stating frounds therefor. The Chief Deputy Clerk stated to him then that, if he would write letter to the Chief Deputy Clerk requesting such extension and mail copy of it to opposing counsel, the extension would be granted. The undersigned wrote such letter and so mailed a copy, stating grounds for the requested extension. Subsequently, he received copy of Order signed by the Chief Deputy Clerk granting the extension to and including September 8, 1969.

5. On September 5, 1969, the undersigned attorney telephoned the Clerk's Office and requested to talk with the Chief Deputy Clerk. Upon being informed that he was not available, the undersigned talked with Mr. Richard Windhorst, Senior Clerk. Request was made to him for a three day extension for filing Appellant's Brief, and Mr. Windhorst was then informed that the Order of the Chief Deputy Clerk granting said extension to and including September 8, 1969 had on it a stamped notation to effect that no further extension should b requested. Mr. Windhorst stated the extension

would be granted if the undersigned mailed letter request for it and sent copy of the letter to opposing counsel, which the undersigned did.

6. In that letter, addressed to the Chief Deputy Clerk and Chief Clerk, which was received in the Clerk's Office on September 8, 1969, the undersigned requested 3 or 4 day extension from September 8, 1969, and stated the 4 day extension was urgently needed. On this morning, September 9, 1969, the undersigned received telephone call from Mr. Windhorst, in which he stated a telegram and telephone call had been received from opposing counsel in opposition to further extension for filing Appellant's Brief. Mr. Windhorst requested that motion be sent for the extension of 4 days requested and indicated, insofar, as the Clerk's Office was concerned, it would be favored.

7. The undersigned continues to have necessity of making frequent trips to his father, who is 86 years of age and a patient in a medical care nursing home, located about 125 miles from Atlanta, and to have to "look after" his father. The pressure of accumulated matters in the practice of the undersigned, matter of energent nature, is very great. He practices alone. His work load is so great that he is unable to get urgently needed dental care, the lack of which is affecting his health.

WHEREFORE, Appellant moves that an extension to and including September 12, 1969, be granted for filing Appellant's Brief.

WYMAN C. LOWE
ATTORNEY FOR APPELLANT

701 Carnegie Building
Atlanta, Georgia 30303

CERTIFICATE OF SERVICE

I hereby certify that I have on this date, Sept. 9, 1969, served a copy of the foregoing motion upon Appellee's counsel, by mailing in the U. S. Mails, postage prepaid, a copy addressed to Ramseur, Bradham, Lyle, Skipper and Cramer, 699 First Avenue, North, St. Petersburg, Florida.

/S/ Wyman C. Lowe
WYMAN C. LOWE

WYMAN C. LOWE

Attorney At Law

Suite 701, Carnegie Building

133 Carnegie Way, N. W.

Atlanta, Georgia 30303

September 6, 1969

Mr. Gilbert F. Ganucheau,
Chief Deputy Clerk, and
Mr. Windhorst, Senior Clerk,
United States Court of Appeals
Fifth Circuit
400 Royal Street-Room 408
New Orleans, Louisiana

RE: WARWICK VS. SEGAN-No. 27903

Dear Mr. Windhorst and Mr. Ganucheau:

The time limitation for filing the required number of copies of Appellant's Brief and the Appendix for the Briefs in the above styled appeal, as extended by an Order by Mr. Ganucheau, Chief Deputy Clerk, will be to and including September 8, 1969. The time limitation by which both were due to be filed before any extension of time was granted was until and including September 2, 1969, which was the next day after Labor Day, a Monday. Ten copies of the Appendix and four sets or volumes of reproductions of the Exhibits included in the Appendix were received there in the Clerk's Office on September 2, 1969.

In a long distance telephone conversation I had on September 5, 1969, with Mr. Windhorst, Senior Clerk, after the person who answered the telephone in the Clerk's Office said Mr. Ganucheau was not available, I requested a three-day extension beyond September 8, 1969, for filing the required 25 copies of Appellant's Brief. Mr. Windhorst stated that extension would be granted upon my making letter request for it and mailing copy of the letter to Appellee's counsel.

The Appendix for the Brief consists of about 750 pages and 30 Exhibits. The preparation of Appellant's Brief on basis of Appellant's Statement of the Issues and the Appendix of said length is a great task. I, as Appellant's attorney, have been devoting much of my time to it, but urgently need and request a 3 or 4-day extension beyond September 8, 1969, for complying with the applicable Rules as to filing of the Brief.

My need to visit frequently and "look after" my 85-year old father, who is a patient in a medical care nursing home, located about 125 miles from Atlanta, continues. The pressure of some accumulated other matters in my practice is great, so great I can not take time to get some urgently needed dental work done.

Under these conditions, I'll greatly appreciate an extension until and including September 12, 1969, which I

need for filing Appellant's Brief under applicable Rules, or at least until and including September 11, 1969, for that purpose.

I have mailed, postage prepaid, in the U. S. Mails a copy of this letter properly addressed to counsel of record for the Appellee, Ramseur, Bradham, Lyle, Skipper & Cramer, 699 First Avenue North, St. Petersburg, Florida.

Kindly mail Air Mail to me copy of the Order as to this request. Enclosed are Air Mail stamps.

Sincerely yours,

Wyman C. Lowe

WCL:wb

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U.S. COURT OF APPEALS

F I L E D

SEP 15 1969

EDWARD W. WADSWORTH
CLERK

APPELLANT'S AMENDMENT OF HER MOTION
FOR A 4-DAY TIME EXTENSION

BETTY PITTMAN WARWICK, Appellant in the above styled appeal, amends as follows her previously filed and served motion for a 4-day extension from September 8, 1969, for filing Appellant's Brief:

By striking paragraph 7 therein, substituting therefor and in lieu thereof the following:

"7. The undersigned is mainly responsible for arranging the continued urgently needed stay of his 86-year old father, a widower, as a patient in a medical-care nursing home, located about 125 miles from Atlanta, Georgiam where the undersigned has his office and about 15 miles from where his father had been living, and for insuring that his father has special medical care when needed over and above that provided by said home. It was necessary for the undersigned to assume financial responsibility for keeping his father in that nursing home for most of the time he has been a patient there. In order to carry out his responsibility for insuring needed medical care and causing his father's bills at that home to be paid, part of which paid by the undersigned, it has been necessary for the

undersigned to make very frequent trips to the nursing home and to spend considerable time on the trips on a matter nearby in which his father has a financial interest.

During the part of last year, the undersigned was a Congressional candidate and for several months thereafter was a contestant in election contests as to the outcome of that race. One of those contests is not yet determined. During that period of time, in which he lost much time from his law practice, there became an accumulation of matters of an emergent nature of his practice. It became necessary for him to obtain leave of absence from a Court in Atlanta part of this year because of said situation. In recent weeks, he has been under a heavy load of work in his practice, barely having time to get enough rest, such that he has not been able to take time to get very urgently needed dental care and work, the lack of which is adversely affecting his general health.

In order to get completed Appellant's Brief in this appeal in time to have it mailed, Air Mail, on September 12, 1969, last day of the time extension he had requested by motion necessary for him to work on the Brief in his office and on night of September 11, 1969."

WYMAN C. LOWE
Attorney for Appellant
(original signed)

701 Carnegie Building
Atlanta, Georgia

CERTIFICATE OF SERVICE

I hereby certify that I have on this date furnished counsel for said Appellee with a copy hereof by mailing, postage prepaid, a copy in the U. S. Mails, addressed to Ramseur, Bradham, Lyle, Skipper and Cramer, 699 First Avenue North, St. Petersburg, Fla.

WYMAN C. LOWE (original signed)

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U. S. COURT OF APPEALS

F I L E D

SEP 12 1969

EDWARD W. WADSWORTH
CLERK

MOTION TO DISMISS

The defendant appellee, BARRY S. SEGAN, by and through his undersigned attorneys, hereby moves this Court for an Order dismissing this appeal for failure to timely prosecute his appeal in accordance with the Federal Rules of Appellate Procedure.

As grounds for seeking this Order, defendant refers to Order of this Court dated September 2, 1969 allowing plaintiff an additional time to file her brief. The Order further stated that no further extension of time should be requested. On September 5, 1969, counsel for plaintiff made oral request for an additional extension, and followed this with a letter of September 6, 1969, formulating her grounds for seeking the added extension. Plaintiff's grounds for extension as therein set forth are simply insufficient to continue allowing time extensions, when such extensions are clearly not within the "Fifth Circuit Policy" Notice from Chief Judge John R. Brown, which accompanied the Spetember 2, 1969 Order of Court.

WHEREFORE, Defendant prays for an Order dismissing the above styled appeal with prejudice.

/S/ James R. Lyle
of Ramseur, Bradham, Lyle,
Skipper & Cramer
699 First Avenue North
St. Petersburg, Florida 33701
Attorneys for Defendant Appellee.

Document No. 10

U.S. COURT OF APPEALS
F I L E D
SEP 15 1969
EDWARD W. WADSWORTH
CLERK

CAPTION OMITTED

APPELLANT'S REPLY TO MOTION OF THE APPELLEE TO DISMISS APPEAL

BETTY PITTMAN WARWICK, Appellant in the above styled appeal, responds as follows to the motion of the Appellee, BARRY S. SEGAN, to dismiss the appeal for alleged failure to prosecute timely the appeal in accordance with the Federal Rules of Appellate Procedure, copy of the motion having been served by mailing on September 9, 1969:

1. On August 1, 1969, an Order of a three-Judge panel of this Court was filed in this appeal. The Order denied the motions of the Appellee to strike and motion of the Appellee to dismiss the appeal. The Appellee's counsel of record had served five or six motions by mailing to the undersigned attorney for the Appellant between July 1, 1969 and July 7, 1969. One of said motions served by mailing on July 2, 1969, was a motion to dismiss the appeal and another said motion was one served by mailing on July 5 or 6, 1969, alternatively, to dismiss the appeal, or strike certain papers filed for the Appellant. The remainder of said motions were to strike certain papers filed for the Appellant. Every one of the motions to strike, the motions to dismiss, and the motion to dismiss or to strike were served by the Appellee by mailing prior to the serving by mailing of the Appellee's motion to dismiss the appeal to which response is made herein. They were predicated, each one, upon the erroneous assumption that the record on appeal had been filed prior

to June 17, 1969. However, a Memo that the undersigned had received from the Clerk's Office on or about June 18, 1969, dated June 17, 1969, indicated that the record on appeal was filed that day. One of the motions to strike was to strike "Appellant's Amended Designation of the Parts of the Record Which She Intends to Include in the Appendix", served by mailing on June 27, 1969, in which Appellant struck her Designation that had been served prematurely on June 13, 1969, substituted therefore and in lieu thereof her "Designation of the Parts of the Record Which She Intends to Include in the Appendix". Another of the said motions to strike was one to strike "Appellant's Amended Statement of the Issues Which She Intends to Present for Review", served by mailing on June 27, 1969, in which Appellant struck her previously served Statement, substituted therefore and in lieu thereof her "Statement of the Issues Which She Intends to Present for Review".

2. This attorney had received prior to receiving a copy of said Order, filed August 1, 1969, denying the motions to strike and the motion to dismiss, a Memo from the Clerk's Office indicating that an extension of time to and including 30 days from date of Order on "motion to strike & dismiss" would be granted "for filing reproduced copies of the record" and "for filing appellant's brief". The undersigned wrote and sent a letter within the next few days to the Chief Deputy Clerk after he received the said Memo in which he inquired whether "filing reproduced copies of the record" meant, in effect, filing 10 copies of the Appendix, as de-

signated for the Appellant, and received reply to the effect that it did. Said 30-day extension from August 1, 1969, was to and including August 31, 1969. Since August 31, 1969 was a Sunday and September 1, 1969, Labor Day, a legal holiday, said extension was effective to and including September 2, 1969.

3. On that date, September 2, 1969, 10 copies of the Appendix, as designated for the Appellant and reproduced by offset printing, together with 4 reproductions of each of the about 30 designated Exhibits, as part of the Appendix, were timely received in the Clerk's Office from the undersigned. The Appendix, exclusive of the Exhibits therein, is about 750 pages in length, and is in three volumes.

4. On August 29, 1969, the undersigned attorney telephoned the Chief Deputy Clerk and requested extension to and including September 8, 1969 for filing the required number of copies of the Appendix and Appellant's Brief. The Chief Deputy Clerk stated the time extension would be granted if this attorney would mail him a letter requesting the extension and mail copy of it to opposing counsel. That was done. The letter request was received in the Clerk's Office on September 8, 1969. Since the Appendix had been received timely on September 2, there was no need for the extension as to filing it requested previously. The Chief Deputy Clerk, in an Order dated September 2, 1969, granted the requested extension as to filing both the Appendix and the Brief. The Order had notice stamped on it that no further extension should be requested.

5. On September 5, 1969, the undersigned attorney telephoned the Clerk's Office and requested to talk with the Chief Deputy Clerk. Upon being informed that the Chief Deputy Clerk was not available, but the Senior Clerk, Mr. Richard Windhorst, was, this attorney talked with Mr. Windhorst. Request was then made to him for the 3-day extension, grounds being stated., and statement being made about said notice on the Order extending the time to and including September 8, for filing Appellant's Brief. Mr. Windhorst said then the extension requested would be granted if this attorney would mail to the Clerk's Office a letter requesting the extension amd mail copy to opposing attorney. This attorney promptly mailed a letter, addressed to the Chief Deputy Clerk and the Senior Clerk, requesting a 3 or 4-day extension from September 8, 1969 for filing Appellant, a Brief, stating the 4-day extension was urgently needed, and giving grounds. The letter was received in the Clerk's Office on September 8, 1969. On the morning of September 9, this attorney received a telephone call from Mr. Windhorst in which he said opposing counsel had objected by telegram and telephone call to the Clerk's Office to any further extension. This attorney never received copy of the telegram from opposing counsel. Mr. Windhorst requested that motion be mailed by the undersigned to the Clerk's Office requesting the 4-day extension and copy be mailed to opposing counsel, and indicated insofar as the Clerk's Office was concerned the 4-day extension would be approved, but there would be need for ruling on the motion by the Court. The undersigned promptly mailed original and 4 copies of the motion to the Clerk's Office and copy to opposing counsel.

6. On September 10 or 11, 1969, this attorney received by mail copy of motion of Appellee to dismiss the appeal for alleged failure to prosecute it timely. He called the Chief Deputy Clerk on September 11, 1969, and asked whether or not he should proceed, without waiting for ruling on the said motion to dismiss, to get Appellant's Brief completed and sent Air Mail to the Clerk's Office on September 12, 1969, the earliest he could possibly do so. This attorney was advised that he should and should mail response to the motion. After working, among much other time, all night the night of September 11 in his office on Appellant's Brief, this attorney caused the printing of it to be completed on the afternoon of September 12, 1969, and he mailed it at the Atlanta Post Office, on September 12, 1969, in 25 copies, to the Chief Deputy Clerk, Air Mail, each of the two boxes containing some of the copies being postmarked September 12, 1969. He understands that such mailing, Air Mail, of Appellant's Brief, is equivalent to filing it on September 12, 1969, under the applicable Rule in F. R. A. P., which provides that sending of an Appendix or Brief by the Expeditious method, exclusive of Special Delivery, on a day will, in effect, be construed to be filing on that day.

7. The undersigned is sending to the Clerk's Office an amendment to his motion for the 4-day extension from September 8, 1969, showing grounds in addition to those stated in the motion and showing that under the necessitous circumstances the completing and sending of the printed copies of Appellant's Brief was practically impossible.

6.

8. It is respectfully pointed out that the undersigned attorney did not receive notice of the filing of the record on appeal and did not receive the record on appeal until either June 18, 1969, and that the notice indicated filing of the record on appeal on June 17, 1969; that from July 3 or 5, 1969, the date he received first copies of motions of the Appellee to strike and copy of motion to dismiss the appeal until he received copy of the Order of the three-Judge panel denying the motions to strike and the motion to dismiss on August 2 or 3, 1969, the undersigned was, in effect, not able to proceed with the Appendix and Appellant's Brief because of state of uncertainty with respect to the motions of Appellee.

WHEREFORE, it is respectfully requested that the motion of the Appellee stated to dismiss the appeal be denied.

WYMAN C. LOWE
Attorney for Appellant
(Original signed)
701 Carnegie Building
Atlanta, Georgia 30303

CERTIFICATE OF SERVICE

I hereby certify that I have on this date, Sept. 12, 1969, served a copy of the foregoing reply to Appellee's motion upon counsel of record for the Appellee by mailing, postage prepaid, in the U. S. Mails, copy addressed to Ramseur, Bradham, Lyle, Skipper and Cramer, 699 First Avenue North, St. Petersburg, Florida.

WYMAN C. LOWE
Attorney

U.S. COURT OF APPEALS
F I L E D
Oct. 1 - 1969
Edward W. Wadsworth
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27903

BETTY PITTMAN WARWICK,
Plaintiff-Appellant,

versus

BARRY S. SEGAN,
Defendant-Appellee.

- - - - -

Appeal from the United States District Court for the Middle District of Florida

- - - - -

Before THORNBERRY, MORGAN and CARSWELL, Circuit Judges.

BY THE COURT:

It is ORDERED that appellant's motion for a further extension of time for the filing of his brief, in the above cause, to and including September 15, 1969, is hereby DENIED.

IT IS FURTHER ORDER that appellee's motion to dismiss this appeal is hereby GRANTED.

Document No. 13

F I L E D
OCT 16 1969

CAPTION OMITTED

APPELLANT'S MOTION FOR RECONSIDERATION AS TO THE ORDER OF THE COURT DENYING HER MOTION FOR A 4-DAY EXTENSION FOR FILING APPELLANT'S BRIEF AND GRANTING APPELLEE'S MOTION TO DISMISS THE APPEAL, AND FOR REINSTATEMENT OF THE APPEAL

Now comes BETTY PITTMAN WARWICK, appellant in the above styled appeal, and moves the Court for reconsideration as to the Order of the three-Judge panel filed October 1, 1969, denying appellant's motion for a 4-day extension of time from September 8, 1969 for filing Appellant's Brief, its Order filed October 1, 1969 granting the appellee's motion to dismiss the appeal, and for reinstatement of the appeal, respectfully showing as grounds therefore as follows:

1. A Memorandum sent to the undersigned attorney from the Office of the Clerk in July, 1969, gave notice that appellant would have to and including 30 days from the date of an Order on the appellee's motion to strike and dismiss "for filing reproduced copies of the record" and "for filing appellant's brief". The undersigned then wrote a letter to the Chief Deputy Clerk inquiring whether "filing reproduced copies of the record" meant filing ten reproduced or printed copies of an appendix for the briefs containing the portions of the record previously timely designated by the appellant for inclusion in the appendix, and received a reply that it did. On August 2 or 3, 1969, this attorney received a Memorandum from the Clerk's Office indicating that the Order of which

copy attached thereto had been rendered. The Order denied the motions of the appellee to strike and denied his motion to dismiss the appeal. A statement in parenthesis at bottom or the copy of the Order showed the Order was filed on August 1, 1969. Therefore, appellant was allowed to and including August 31, 1969, for filing the appendix and appellant's brief. Since August 31 was a Sunday and the next day, September 1, was Labor Day, a legal holiday, under Rule 26 (a), F.R.A.P., appellant was allowed to and including September 2, 1969, for said purposes. The required number of copies of the very lengthy appendix, offset printed, with a letter of transmittal attached on top of one of the copies requesting the filing of the appendix on day received, were received in the Clerk's Office on said date, September 2, 1969, having been sent by Air Express.

2. On August 28 or 29, 1969, this attorney, in a long distance telephone conversation with the Chief Deputy Clerk, stated that an extension of time to and including September 8, 1969, which would be an extension of 6 days, was needed for filing appellant's brief, that he expected to be able to send the appendix in time for it to be received on September 2, 1969, but that it would be best for him to have a few days extension beyond September 2 for filing it also. The Chief Deputy Clerk, Mr. Ganucheau, then stated that, if the undersigned would mail him a letter requesting extension to and including September 8, extension would be granted.

3.

The undersigned promptly did that. The Chief Deputy Clerk did cause to be mailed to this attorney on September 2, 1969, a Memorandum by him, dated September 2, 1969, granting an extension to and including September 8, 1969, for filing reproduced copies of the record (appendix) and appellant's brief. There was stamped on the Memorandum "No further extension should be requested". This 6-day extension was the first extension of time for filing either the appendix or appellant's brief that had been requested for the appellant. Ten offset printed copies of the appendix, exclusive of the exhibits, each said copy consisting of three bound volumes, totalling about 750 pages, and four reproduced copies of the about 30 exhibits, each of some of the exhibits consisting of many parts, were received timely in the Clerk's Office for filing on September 2, 1969, without need or use of any day of the 6-day extension granted by the Chief Deputy Clerk for filing the appendix. Two copies of the appendix, exclusive of the exhibits, and one reproduction of each exhibit were mailed to appellant's counsel, although only one copy required to be sent..

3. On September 4 or 5, 1969, before expiration of the extension the Chief Deputy Clerk had granted to and including September 8, 1969, for filing appellant's brief, this attorney for the appellant telephoned the Clerk's Office, requested to talk with the Chief Deputy Clerk, and upon being informed he was not available but the Senior Clerk was, talked with Mr. Richard Windhorst, the Senior Clerk. The Undersigned indicated to Mr. Wind-

horst then the need of appellant for a 3 or 4-day extension from Monday, September 8, 1969, for filing appellant's brief and referred to the said statement, "No further extension should be requested", that was stamped on the said Memorandum granting the 6-day extension from September 2, 1969, which was the only extension for filing appellant's brief in this appeal the undersigned had ever requested previously. Mr. Windhorst then said, in effect, that if this attorney would mail to the Clerk's Office a letter requesting such extension, that extension would be granted, if this attorney mailed a copy also to appellee's counsel, a copy of the letter request. The mailing of the original of the letter request to the Clerk's Office and the copy to appellee's counsel was done promptly. The undersigned later found out his said letter was received in the Clerk's Office on September 8, 1969. He relied on said statement of Mr. Windhorst, made over the telephone on September 4 or 5, 1969 that the requested extension would be granted. He could have mailed, Air Mail, before midnight of September 8, 1969, appellant's brief in shorter and not as complete form as he mailed it, Air Mail, before midnight of September 12, 1969, in the Atlanta Post Office, addressed to the Chief Deputy Clerk. In this connection, the following sentence is quoted from Rule 25 (a), F. R. A. P.:

* * * Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs and appendices shall be deemed filed on the day of

mailing if the most expeditious form of delivery by mail, excepting special delivery, is used."

4. On the morning of Tuesday, September 9, 1969, this attorney received a telephone call from Mr. Windhorst, who then stated counsel for the appellee had made a telephone call to the Clerk's Office and a telegram had been received in the Clerk's Office from appellee's counsel, the call and telegram opposing extension for filing appellant's brief. Mr. Windhorst also said in the telephone conversation that morning this attorney should mail to the Clerk's Office for filing a motion for the 4-day extension from September 8, 1969, he stated to Mr. Windhorst would be needed for filing appellant's brief; and Mr. Windhorst also then indicated that, insofar as the Clerk's Office concerned, the 4-day extension requested in the motion would be approved, but there would be necessity for the Court to rule on the motion. Original and three carbon copies of the motion for the 4-day extension were mailed, Air Mail, Special Delivery, that day to the Clerk's Office for filing and copy mailed to appellee's counsel that day.

5. On September 9, 1969, appellee's counsel mailed to appellant;s attorney copy of a motion to dismiss the appeal on alleged ground of failure to prosecute it timely. On September 11, 1969, the undersigned mailed to the Clerk's Office appellant's reply to the motion to dismiss and mailed copy to appellee's counsel.

6.

6. On September 11, 1969, this attorney made inquiry by telephone to the Chief Deputy Clerk whether or not he should wait for ruling by the Court on appellee's motion to dismiss before mailing, Air Mail, appellant's brief, was told to mail the brief and not wait for such ruling before mailing the brief. On or about September 15, 1969, appellant's attorney received a Memorandum from the Clerk's Office providing that appellant would have to and including September 18 (8), 1969, for filing reply to appellee's motion to dismiss. Appellant's reply to the motion to dismiss had already been mailed to the Clerks' Office. On September 12, 1969, this attorney mailed an amendment to appellant's motion for the 4-day extension from September 8, 1969, to the Clerk's Office and copy to appellee's counsel, the amendment striking paragraph 7 of appellant's motion, which contained grounds therefor, and substituting in lieu thereof and therefor another paragraph 7, which reads:

"7. The undersigned is mainly responsible for arranging the continued urgently needed stay of his 86-year old father, a widower, as a patient in a medical-care nursing home, located about 125 miles from Atlanta, Georgia, where the undersigned has his office and about 15 miles from where his father had been living, and for insuring that his father has special medical care when needed over and above that provided by said home. It was necessary for the undersigned to assume financial responsibility for keeping his father in that nursing home for most of the time he has been a patient there.

7.

"In order to carry out his responsibility for insuring needed medical care and causing his father's bills at that home to be paid, part of which paid by the undersigned, it has been necessary for the undersigned to make very frequent trips to the nursing home and to spend considerable time on the trips on a matter nearby in which his father has a financial interest.

"During the last part of the year, the undersigned was a Congressional candidate and for several months thereafter was a contestant in election contests as to the outcome of that race. One of those contests is not yet determined. During that period of time, in which he lost much time from his law practice, there became an accumulation of matters of an emergent nature in his practice. It became necessary for him to obtain a leave of absence from a Court in Atlanta part of this year because of said situation. In recent weeks, he has been under a heavy load of work in his practive, barely having time to get enough rest, such that he has not been able to take time to get very urgently needed dental care and work, the lack of which is adversely affecting his general health. "In order to get completed Appellant's Brief in this appeal in time to have it mailed, Air Mail, on September 12, 1969, the last day of the time extension he had requested by motion, it was necessary for him to work on the Brief in his office all night on night of September 11, 1969."

7. Said grounds in the motion, as

amended, for the 4-day extension from September 8, 1969, show, in effect, that under necessitous circumstances the completing and mailing, Air Mail, of the stated offset printed copies of Appellant's Brief that were mailed, Air Mail, on September 12, 1969, at the main Post Office in Atlanta, Georgia, was practically impossible to be done prior to September 12, 1969.

8. A Deputy Clerk of this Court informed appellant's attorney in a telephone conversation in afternoon of October 10, 1969 that boxes in which briefs are sent and wrappings around briefs received in the Clerks' Offices are usually discarded and caused to be destroyed at about the time briefs received in the Clerk's Offices. The two cardboard boxes, one containing 12 copies of Appellant's Brief, and the other containing 13 copies of that Brief, were mailed, Air Mail, by the undersigned at a window of the main Atlanta Post Office a few minutes before midnight of September 12, 1969, and each postmarked "SEPT12 1969". A letter of transmittal was enclosed in the cardboard box containing the copies of the appendix, that was received in the Clerk's Office on September 2, 1969 timely, the box having been sent by Air Express. However, no letter of transmittal was enclosed in either of them, two cardboard boxes, one containing 12 copies of Appellant's Brief, and the other containing 13 copies of that Brief, in this appeal, both mailed at same time, Air Mail, postage prepaid, in the Atlanta Post Office by the undersigned before midnight of September 12, 1969, and received in the Clerk's Office on September 15, 1969, a Monday; and not any letter as to

transmittal of the copies of that Brief was ever sent, separately, to the Clerk's Office. The undersigned had stated over telephone on September 11, 1969 to the Chief Deputy Clerk that he would mail, Air Mail, on September 12, 1969, the copies of Appellant;s Brief for filing.

9. It appears that, since the copies of the Brief were not received in the Clerk's Office until Monday, September 15, and neither of the two boxes postmarked "SEPT12 1969" that had contained the 25 copies of that Brief was probably ever before any of the Judges on the three-Judge panel which denied appellant's motion for the 4-day extension and granted appellee's motion to dismiss the appeal, the panel was unaware the copies had been mailed, Air Mail, on September 12, and that September 12, 1969, was, in effect, the filing date, instead of September 15, 1969, Air Mail being the most expeditious method of mailing excepting Special Delivery.

A paragraph in the Order of the panel filed October 1, 1969, refers to a motion of appellant for time extension as one for extension to and including September 15, 1969, and contains denial of such a motion, but requestwas made in the motion only for a 4-day extension from September 8, 1969, for filing Appellant's Brief.

10. The original of notations and Post Mark made and initialed by Mr. James F. Wright, Post Office Clerk, who received the two boxes at a window of the Federal Annex, the main Post Office in Atlanta, Georgia, between 11:30 and 12:00 P.M. on September 12, 1969, and a signed statement by Mr. Wright obtained from him, the original thereof, as to that mailing are attached to the

original of this motion, and photocopies of the said initialed notations and signed statement of Mr. Wright are attached to each copy of the motion, and made parts hereof.

11. There have been very heavy costs of prosecution of this case in the United States District Court in Tampa, Florida, and the appeal in this Court, which among other things entailed the taking of about 15 depositions in Atlanta, Georgia the place of occurrance of the injuries of the plaintiff-appellant, the making of two or three trips by the plaintiff to Tampa, the making of five or six trips of a few days each by the undersigned to Tampa, the printing of the very lengthy portions of the record designated for inclusion in the appendix, consisting of about 750 pages selected by the undersigned, from a much longer record, and Appellant's Brief.

12. The motions of the appellee, served between July 2 and 6, 1969, to strike certain pleadings of the appellant in this Court, to dismiss the appeal, and the motion to strike or dismiss were mainly based upon erroneous assumption that the record on appeal had been filed prior to June 17, 1969, but a Memorandum from the Clerk's Office dated June 17, 1969, showed the record had been filed June 17, 1969. The undersigned did not receive the record on appeal until June 18 or 19, 1969.

WHEREFORE, appellant, BETTY PITTMAN WARWICK, prays that the Court reconsider her motion for 4-day time extension for filing Appellant's Brief, the motion of the appellee, BARRY S. SEGAN, to dismiss the appeal, the two-paragraph Order of the Court filed October 1, 1969, denying the motion of the appellant for time extension and granting the motion of appellee to dismiss the

appeal, and that the Court reinstate the appeal.

Respectfully submitted,

/S/ Wyman C. Lowe

WYMAN C. LOWE
Attorney for Appellant
701 Carnegie Building
Atlanta, Georgia 30303

CERTIFICATE OF SERVICE

I hereby certify that I have on this date, early in the morning, October 15, 1969, served a copy of the foregoing motion and the two exhibits attached beneath the motion upon counsel of record for said appellee by mailing in the U. S. Mails, postage prepaid, a copy addressed to Ramseur, Bradham, Lyle, Skipper & Cramer, 699 First Avenue North, St. Petersburg, Florida.

/S/ Wyman C. Lowe

WYMAN C. LOWE
Attorney

POSTAL SERVICE — FOUTH CLASS

TO:
1 U.S. Court of A
2
3
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5

POSTAL OFFICE OR ROOM NO.

- [ ] CONCURRENCE
- [ ] SEE ME
- [ ] AS REQUESTED
- [ ] INFORMATION
- [ ] READ AND RETURN
- [ ] READ AND FILE
- [ ] NECESSARY ACTION
- [ ] INVESTIGATE
- [ ] RECOMMENDATION
- [ ] PREPARE REPLY

Verified by window clerk

ATLANTA, GA. OCT 15 1969 FEDERAL ANNEX

FROM: Verified by window Clerk
James F. Wright - Fed. Annex
Atlanta, Ga.

DATE OCT 15 1969

EXTENSION

ROOM NO.

REMARKS:

On the 9/12/69, Mr. Lowe mailed two Packages Air Mail to New Orleans, LA.

They were mailed between 11:30 P.M. & 12.00 P.M. of that date and addressed to. Chief Deputy Clerk
U.S. Court of Appeals
5 Circuit
400 Royal street
New Orleans, LA.

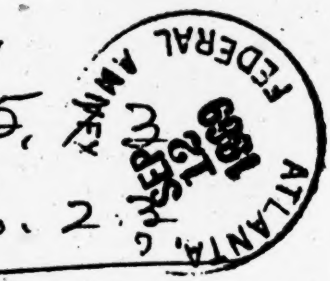
ATLANTA, GA OCT 15 1969 FEDERAL ANNEX

POD Form 13
July 1967

(Additional Remarks on Reverse) GPO : 1968—c48—16—8027z-I 326-691

11 lbs. 12 oz

10 lbs 15 oz.



#5.
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J. Fw.
Ok.

xxxiii

U.S. COURT OF APPEALS

F I L E D

NOV 3 1969

EDWARD W. WADSWORTH
CLERK

APPELLANT'S AMENDMENT OF HER MOTION FOR RECONSIDERATION AS TO THE ORDER FILED ON OCTOBER 1, 1969, AND FOR REINSTATEMENT OF THE APPEAL

Now comes BETTY PITTMAN WARWICK, Appellant in the above styled appeal, and amends as follows her motion for reconsideration as ti the Order filed October 1, 1969, denying her motion for time extension for filing Appellant's Brief, granting the motion of the Appellee to dismiss the appeal, and for reinstatement of the appeal:

1. By adding to the motion between Paragraphs 6 and 7 the following as Paragraph 6-A:

"6-A. In the preceding Paragraph 6 of this motion, Appellant quotes Paragraph 7 of her motion, as amended, for a 4-day time extension from September 8, 1969, for filing Appellant's Brief, that Paragraph 7 containing her grounds for the motion. Part of the said grounds are quoted again below:

'In recent weeks, he had been under a heavy load of work in his practice, barely having time to get enough rest, such that he has not been able to take

time to get very urgently needed dental care and work, the lack of which is adversely affecting his general health.'

"In connection with the said part of Appellant's grounds in her motion for the 4-day extension and in support of her motion for reconsideration as to the Order filed October 1, 1969, and for reinstatement of the appeal, a signed statement of a dentist with respect to Appellant's attorney, Wyman C. Lowe, is attached hereto and made part hereof, original being attached to this 2 page original.

/S/ Wyman C. Lowe
WYMAN C. LOWE
Attorney for Appellant

701 Carnegie Building
Atlanta, Georgia 30303

CERTIFICATE OF SERVICE

I hereby certify that I have on this date, October 30, 1969, served a copy of the foregoing amendment and exhibit attached beneath upon counsel of record for said Appellee by mailing in the U. S. Mails, postage prepaid, a copy, addressed to Ramseur, Bradham, Lyle, Skipper and Cramer, 699 First Avenue North, St. Petersburg, Florida.

/S/ Wyman C. Lowe
WYMAN C. LOWE
Attorney

xxxv

PETER A. JENSEN, ., D. D. S.
2706 Clairmont Rd. N. E.
Atlanta 6, Georgia

ME 6-6066

October 30, 1969

TO WHOM IT MAY CONCERN:

Mr. Wyman C. Lowe was in my office at 4:00 P.M., July 28, 1969. He had a badly broken down right molar which was an abutment to a four unit bridge. I recommended extraction of these teeth and other teeth in the lower arch. He had a great deal of infection around these teeth which held the fixed bridgework in place.

Mr. Lowe was back in my office Oct. 30, 1969 at 4:00 P.M. At this time I examined him again and found that the bridge on the right side had broken out and he had lost a front tooth due to a periodontal condition.

His general dental condition has adversely affected his health, at his age of 64 years.

He was presented this afternoon with a treatment plan which he said he intends to follow through with.

/S/ Peter A. Jensen, Jr.
PETER A. JENSEN, JR., D.D.S.

U.S. COURT OF APPEALS

F I L E D

NOV 11 1969

EDWARD W. WADSWORTH
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27903

BETTY PITTMAN WARWICK,

Plaintiff-Appellant,

versus

BARRY S. SEGAN,

Defendant-Appellee,

- - - - - -

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

- - - - - -

Before, THORNBERRY, MORGAN and CARSWELL, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's motion for reconsideration of this Court's order denying appellant's motion for a four day extension of time for the filing of her brief and granting appellee's motion to dismiss the appeal is hereby DENIED.

IT IS FURTHER ORDERED that appellant's motion for reinstatement of this appeal is hereby DENIED.

Document No. 18

(g) BASIS FOR FEDERAL JURISDICTION IN THE COURT OF THE FIRST INSTANCE.

The basis for federal jurisdiction in this case in the court of the first instance, the United States District Court, Middle District of Florida, Tampa Division, in which the complaint was filed and the case tried before a jury, was complete diversity of citizenship of the plaintiff and defendant and the fact the amount in controversy was $100,000.00, more than $10,000.00, exclusive of court costs.

(h) ARGUMENT

A motion of the Appellee, Barry S. Segan, for dismissal of the appeal on grounds of failure of Appellant to file her Brief by September 8, 1969, was not filed prior to September 12, 1969, and was filed on that date, which was the date Appellant was entitled, under applicable provisions in Rule 25 (a), Federal Rules of Appellate Procedure, for her Brief to be deemed filed. That Appellant, Betty Pittman Warwick, was entitled to the filing of her Brief as of September 12, 1969, has been established hereinbefore in the "Statement of the Case", including the "Supplement" thereto, which contains copies of various relevant documents certified in the Transcript of the Record.

Since the motion for such dismissal on said ground was not made before the date of filing that Rule 25 (a), F. R. A. P., makes it mandatory for Appellant's Brief to be deemed filed, the motion to

dismiss the appeal should not have been granted, according to the following decisions:

"Appellant's brief was not filed within the time limited by the rules of this court, but was filed before any motion was made to dismiss the appeal. The default was therefore cured before any attempt was made to take advantage of it***."

American Insurance Co. v. Scheufler, 129 F 2D 143.

The rule dismissing an appeal for not filing the transcript of the record within the first six days of the term where the transcript has been filed before the motion to dismiss.

Bingham v. Morris, 3L Ed 281

Where the record on appeal was duly received and filed with the Clerk of the Supreme Court of the United States, but the appeals had not been docketed because the rules as to a deposit for costs and as to entry of appearance had not, through inadvertence, been complied with; and afterwards, on a compliance with such rules, the case was docketed and appearance entered a subsequent motion to dismiss for not docketing the case in time will not be granted.

Richardson v. Green, 130 US 104, 32 L ed 872.

Appellant filed timely on September 2, 1969, the very lengthy Appendix, consisting of three offset printed volumes, having total of about 750 pages, and a volume containing reproductions of very many exhibits. The date she was entitled by said Rule 25 (a), F. R. A. P., for her Brief to be deemed filed was only 4 days after it was due to be filed. Such filing was at most a non-jurisdictional defect in the prosecution of the appeal and not sufficient to warrant dismissal, according to the following decisions, the first which was a 1956 decision by the U.S. Court of Appeals, 5th Circuit:

> Late filing of record and brief on appeal was at most a non-jurisdictional defect in the prosecution of the appeal and was not sufficient to warrant dismissal. Phillips v. Employers' Mut. Liability Ins. Co. of Wis., 239 F. 2d 79

> Appeal in an important case would not be dismissed because of failure of appellant's attorney to file brief on their behalf within time required. International Broth. of Teamsters, etc., of America v. U. S., 272 F. 2d 11

> Where final judgment was entered for plaintiff on March 30, 1940, and at 2:05 P.M. on April 9, defendants filed notice of appeal, together with cost bond on appeal, and defendants' transcript of evidence and proceedings at

trial was filed in Court of Appeals on July 1, and their statement of points on was filed on July 2, appeal would not be dismissed for failure to comply with rules concerning time and place for filing statement of points relied on, since there was no failure by defendants to take steps to secure the review of the judgment within Federal Rules of Civil Procedure which affected validity of appeal. Fiske v. Wallace, 115 F. 2d 1003, certiorari denied 62 S. Ct. 123, two cases, 314 U.S. 663, 86 L. Ed. 531, rehearing denied 62 S. Ct. 174, two cases, 314 U.S. 710, 86 L. Ed. 566, rehearing denied 62 S. Ct. 910, two cases, 315 U.S. 829, 86 L. Ed. 1224.

An appeal from an interlocutory order would not be dismissed on the appellee's motion because appellant docketed the record one day after the time permitted by a valid extension since the delay was de minimis.

Pacific Coast Marine Firemen, etc, Assoc, v. Coastwide Line, 171 F. 2d 284.

In this connection, the following additional citation is given:

"***and decisions on the merits should not be avoided on basis of 'mere technicalities'". Forman v. Davis, 371 U.S. 178,

181, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222, 225.

Appeals should be decided if at all possible on the merits.

Morrison v. Texaco Co, 289 F. 2d 382.

Appellee's reply in opposition to the motion for reconsideration and reinstatement was filed five days later than Rule 27 (a), Federal Rule of Appellate Procedure, authorizes the filing of a response in opposition to a motion. By way of comparison, it is stated that the date Appellant's Brief deemed filed under provision in Rule 25 (a), F. R. A. P., was four days after the date it was due to be filed.

The certificate of service at end of Appellant's motion for reconsideration and reinstatement shows copy thereof was served upon Appellee's counsel on October 15, 1969 (Supp., p. xxx), and an entry in "Filings-Proceedings" (Supp. p. ii) shows the motion was filed October 16, 1969. An entry on the same page of "Filings-Proceedings" shows the Appellee's reply to that motion was not filed until October 27, 1969, 12 days after the date of serving of a copy of the motion. The last sentence in Rule 27 (a), F. R. A. P., reads:

"Any party may file a response in opposition to a motion other than one for a procedural order (for which see subdivision (b) within 7 days after service of

"the motion, but motions authorized by Rules 8, 9, 18 and 41 may be acted upon after reasonable notice, and the court may shorten or extend the time for responding to any motion."

With respect to the statutory time of 90 days from date of entry of a judgment or order of a final nature in an United States Court of Appeals for filing in the Supreme Court of the United States a petition for certiorari for review, it is stated that the main Order as to which petitioner seeks review was filed on October 1, 1969, and that there has been tolling of time from October 1, 1969, to and including November 11, 1969, the date of filing of the Order denying Appellant's motion for reconsideration and reinstatement. In support of this contention, the following citations of decisions are given:

> Consideration and determination by judge of petition to vacate order of dismissal and reinstate action operated to extend time for appeal from order sought to be vacated and therefore where appeal from such order was filed March 15 and order denying petition to vacate was entered on February 26, appeal from order sought to be vacated was timely, though filed more than 150 days after such order had been entered.

Salmon v. City of Stuart, Fla., 194 F. 2d 1004.

> The running of time for taking an appeal from a judgment in a civil

action is terminated by the making of a timely motion for new trial and does not commence to run again until the motion has been denied.

Kelly v. Pennsylvania R. Co., 228 F.2d 727, certiorari denied 76 S. Ct. 782, 351 U. S. 925, 100 L. Ed. 1455.

Where district court entertained defendant's motion for rehearing of her motion to set aside judgment and for a new trial, original order refusing to set aside judgment did not become appealable until motion for hearing was overruled.

Hicklin v. Edwards, 222 F.2d 921.

Where judgment was rendered on April 27 and motion for new trial was overruled June 10, notice of appeal was taken from judgment entered on June 10 was sufficient to perfect an appeal from judgment of April 27, since that was the only appealable judgment entered in the cause.

Wilson v. Southern Ry. Co., 147 F.2d 165.

Motion for reconsideration of order dismissing complaint terminated running of time in which to appeal from the order, but the time within which to appeal from the order commenced to run from denial of the motion.

Yates v. Behrend, 280 F.2d 64, 108 U. S. App. D. C. 56.

> Generally, where a tolling petition is seasonably made and entertained, the time for appeal does not begin to run until after disposition of the motion.

Leishman v. Associated Wholesale Electric Co., 63 S. Ct. 543, 318 U. S. 203, 87 L. Ed. 714, rehearing denied 63 S. Ct. 758, 318 U. S. 800, 87. ED.1163.

> "If the petitions are to be treated as petitions for rehearing as the petitions were in Bowman v. Loprena, 311 U. S. 262, 61 S. Ct. 201, 85 L. ED.177, where after a motion for rehearing had been considered and denied, the petitioner appealed from the judgment which he was seeking to review, we think it plain that the consideration and determination of the petitions on the merits by the judge operated to extend the time for appeal from those judgments."

Cromelin v. Markwalter, U. S. Court of Appeals, Fifth Circuit, 181 F.2d 949.

Part of amended paragraph 7 of Appellant's motion for said 4-day time extension for filing her Brief is quoted next, said paragraph appearing as Document 12 on pages ix and x of said Supplement, that is at the end of her "Statement of the Case" herein:

> "7. The undersigned is mainly responsible for arranging the continued urgently needed stay of his 86-year old father, a widower, as a patient in a medical-care nursing home, located about

"125 miles from Atlanta, Georgia where the undersigned has his office and about 15 miles from where his father had been living, and for insuring that his father has special medical care when needed over and above that provided by said home. It was necessary for the undersigned to assume financial responsibility for keeping his father in that nursing home for most of the time he has been a patient there. In order to carry out his responsibility for insuring needed medical care and causing his father's bills at that home to be paid, part of which paid by the undersigned, it has been necessary for the undersigned to make very frequent trips to the nursing home and to spend considerable time on the trips on a matter nearby in which his father has a financial interest."

"During part of last year, the undersigned was a congressional candidate and for several months thereafter was contestant in election contests as to the outcome of that race. One of those contests is not yet determined. During that period of time, in which he lost much time from his law practice, there became an accumulation of matters of an emergent nature in his practice. It became necessary for him to obtain leave of absence from a Court in Atlanta part of this year because of said situation. In recent weeks, he has been under a heavy load of work in his practice, barely having time to get

"enough rest, such that he has not been able to take time to get very urgently needed dental care and work, the lack of which is adversely affecting his general health."

The undersigned attorney's father died in said nursing home on November 5, 1969, which was in the next month after the undersigned filed the motion and amendment hereto for 4-day time extension.

With respect to the statement by the undersigned attorney in the quoted part of said paragraph 7, wherein he said he had recently been under such heavy load of work in his practice that he had not been able to take time to get urgently needed dental care, the lack of which was adversely affecting his health, the following sentence is quoted from a memorandum regarding the undersigned made by Dr. Jensen, a dentist, photographic copy of which is attached as an exhibit to and as a part of Appellant's amendment to her motion for reconsideration and reinstatement (Supp. , p. xxxv):

"His general dental condition has adversely affected his health, at his age of 64 years."

The grounds for the 4-day extension requested in the motion, as amended, show necessitous circumstances that warranted granting of the very short extension.

The body of the letter, dated January 23, 1970, to the undersigned from the Chief Deputy Clerk of the Court of

Appeals reads:

> "Complying with your request by letter dated January 15, this letter will certify that your brief in the above case was received and filed in this office on Monday, September 15, 1969; that under our practice all wrappings, envelopes, boxes, packages, etc. are destroyed immediately when received and there is no record of the postmark date of transmittal of the brief available in our file, nor does our file contain a covering letter of transmission of the brief."

Paragraphs 8, 9, and 10 of Appellant's motion for reconsideration and reinstatement, the photographic copies of the two exhibits thereto (Supp. xxvii-xxix, xxxl, xxxii), together with the letter of the Chief Deputy Clerk to the undersigned, dated January 23, 1970, original of which is the third page in the Transcript of the Record and photographic copy of which is on page ii-a of said Supplement, conclusively show when Rule 25 (a), F. R. A. P., is considered in conjunction with them, that Appellant's Brief should have been deemed filed on September 12, 1969, but that the said three-Judge panel probably did not receive notice from the Clerk's office that the two boxes containing the copies of the Brief bore Atlanta postmarks of September 12, 1969, and stampings of "Air Mail" and considered the filing date to have been September 15, 1969 instead.

Moreover, it is respectfully stated that the fact the panel rendered an

Order denying a motion by Appellant for a time extension "to and including September 15, 1969" for filing her brief, when the only motion of the Appellant for time extension for filing her Brief on file was the one in which she moved for time extension for that purpose "to and including September 12, 1969" raises a question as to whether or not the panel has read the motion or had it before them at time of making that ruling.

(i) No opinion was delivered upon the rendering of each of said two Orders sought to be reviewed. A copy of the said Order that was entered on October 1, 1969, and a copy of the said other Order that was entered on November 11, 1969, appear on pages lxiii and the last page, respectively, of the "Supplement to the Statement of the Case," which follows next after the "Statement of the Case," the pages of that "Supplement" being numbered with small Roman numerals to distinguish them from the rest of the petition.

THEREFORE, it is respectfully submitted that the petition for writ of certiorari for review of said two Orders of the Court of Appeals should be granted.

Respectfully submitted,

WYMAN C. LOWE
701 Carnegie Building
Atlanta, Georgia 30303

Attorney for Petitioner

CERTIFICATE OR PROOF OF SERVICE

I hereby certify that I, a Member of the Bar of this Court, on this date, January 26, 1970, served a copy of the foregoing and within petition for certiorari upon said Respondent in Certiorari Barry S. Segan, by depositing in the U. S. Mails, one copy of it in envelope sufficient postage being attached to carry the envelope to its destination, addressed to Ramseur, Bradham, Lyle, Skipper, and Cramer, 699 First Avenue North, St. Petersburg, said law firm having been counsel of record for Barry S. Segan in this case in the lower courts.

WYMAN C. LOWE
Attorney